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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MELODY L. COCHRAN,

Plaintiff and Appellant,

v.

KRISTIN C. STARR,

Defendant and Respondent.

B213445

(Los Angeles County  
Super. Ct. No. BC358936)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Rolf M. Treu, Judge. Reversed.

Law Office of Louis P. Dell and Louis P. Dell for Plaintiff and Appellant.  
Steven B. Simon for Defendant and Respondent.

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Plaintiff Melody L. Cochran ("Cochran") appeals the judgment in favor of Kristin C. Starr ("Starr"), entered following the latter's successful motion for judgment on the pleadings. The trial court took judicial notice of the contents of certain documents on file in the dissolution action of Cochran and her husband, William Bennett, and ruled that Cochran's judicial admissions establish that the statute of limitations has run on her claims against Starr. We disagree, and reverse the judgment.

### FACTUAL AND PROCEDURAL SUMMARY<sup>1</sup>

Cochran and Bennett were married on December 11, 1994. Cochran filed a petition for dissolution of the marriage on August 26, 2002.

Prior to her marriage, Cochran had inherited a residence located at 1526 North Avenue 50 in Los Angeles (the "Property"), as her sole and separate property. During the marriage, Bennett promised to manage the Property on Cochran's behalf. In 1996, without Cochran's knowledge, consent or authorization, Bennett caused Cochran's signature to be forged on a grant deed; Starr notarized the forged signature, resulting in the transfer of record title to others. Through a series of subsequent transfers, Anthony Delonay, Bennett's business partner, became the record owner of the Property in 2003. Cochran learned of these fraudulent transfers of the Property in February 2004.

Cochran filed this suit to quiet title to the Property on September 21, 2006; the operative second amended complaint was filed on August 24, 2007. In that complaint, Cochran named as defendants Bennett, Delonay, and Starr, as well as the beneficiary and trustee under two deeds of trust which were purportedly secured by the Property.

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<sup>1</sup> For purposes of this discussion, we accept as true the well-pleaded facts of the complaint.

This appeal concerns defendant Starr, against whom Cochran sought damages for money had and received and fraud.<sup>2</sup>

Starr moved for judgment on the pleadings based on the statute of limitations. As had Bennett, Starr sought to have statements made by Cochran in the dissolution proceeding judicially noticed, claiming that these statements establish that she was at least on inquiry notice of the fraud more than three years before this action was filed (i.e., before September 21, 2003). The trial court granted the request for judicial notice, and entered judgment on the pleadings, from which Cochran appeals. For the reasons set forth in our opinion in Cochran's appeal of the judgment in favor of Bennett, which we repeat below, we reverse the judgment.

#### STANDARD OF REVIEW

"A demurrer lies '[w]hen any ground for objection to a complaint, . . . appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, . . . .' (Code Civ. Proc., § 430.30, subd. (a).) Consequently, the 'demurrer tests the pleading alone and not the evidence or other extrinsic matters which do not appear on the face of the pleading or cannot be properly inferred from the factual allegations of the complaint. This principle means that if the pleading sufficiently states a cause of action the demurrer cannot be granted on the basis of a showing of extrinsic matters by inference from attached exhibits, affidavits or otherwise except those matters which are subject to judicial notice.' (*Executive Landscape Corp. v. San Vicente Country Villas IV Assn.* (1983) 145 Cal.App.3d 496, 499.)" (*Bach v. McNelis* (1989) 207

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<sup>2</sup> The trial court also entered judgment against co-defendant Delonay, which Cochran also appealed. However, Delonay filed for bankruptcy protection on October 27, 2009, staying these proceedings as to him. (11 U.S.C. § 362(a).) Cochran's appeal of the judgment earlier entered in favor of Bennett was resolved in an opinion filed on September 18, 2009 (B210747).

Cal.App.3d 852, 864.) "[T]he question of proof cannot be resolved on a demurrer where all properly pled allegations 'are taken as true even though their proof appears unlikely.' (*Stanson v. Brown* (1975) 49 Cal.App.3d 812, 814.)" (*Bach v. McNelis, supra*, 207 Cal.App.3d at p. 866.) "A motion for judgment on the pleadings 'is made on the same grounds, and is decided on the same basis, as a general demurrer, i.e., it will be granted only if the complaint on its face fails to state a cause of action.' (5 Witkin, Cal. Procedure (3d ed. 1985) Pleadings, § 953, pp. 385-386.)" (*Bach v. McNelis, supra*, 207 Cal.App.3d at p. 865.) "As a reviewing court, we are not bound by the construction of the pleadings by the trial court, but we make our own independent judgment of the sufficiency of the complaint. [Citation.]" (*Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, 1521.)

## DISCUSSION

Starr requested the trial court to take judicial notice, as court records pursuant to Evidence Code section 452, subdivision (d), of the following documents:

1. Cochran's dissolution petition filed on August 26, 2002, and specifically Attachment 4 thereto, a list of property as to which "Petitioner requests confirmation as separate property assets;" the Property does not appear on the list. Starr argues that this constitutes Cochran's admission that she no longer owned the Property as of August 2002.
2. Cochran's Order to Show Cause filed on November 26, 2002, together with her supporting declaration. In this declaration, Cochran expresses the shock she experienced when she learned that she "was married to a professional 'con-man' with a litany of prior criminal activities." She also references a "home" which she "lost" on account of Bennett's actions: "As I look back on our relationship, I realize that respondent caused me to lose my first home . . ." and "As I have indicated above,

prior to our marriage I lost my home as a direct result of my having completely, albeit foolishly, trusting respondent." Starr argues that this declaration, coupled with Cochran's deposition testimony in which she stated that the "first home" referred to in the foregoing declaration was the Property on North Avenue 50, establishes that she knew that she no longer owned the Property more than three years before this lawsuit was filed.

3. Cochran's response to form interrogatories propounded in the dissolution action, in which she states that Bennett "indicated to me that I was still an owner of my residence, which I had prior to the incident, located at 55026 [sic] North Avenue 50, Los Angeles, California. Mr. Bennett indicated he would be deeding that back to me, even though it was in my name prior to our marriage." Again, Starr argues that this statement constitutes a judicial admission that Cochran knew, as of the time the statement was made, that Bennett had fraudulently transferred the Property out of her name.

Cochran maintains that the trial court erred in taking judicial notice of the foregoing documents. Starr counters that the statements in Cochran's declarations and dissolution petition were properly judicially noticed, arguing that a court may take judicial notice of the admissions or inconsistent statements by a pleader made in prior pleadings, citing *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604-605 and *Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 383-384.

"Although a court is authorized to take judicial notice in connection with a demurrer (Code Civ. Proc., § 430.30, subd. (a)), it may not judicially notice the truth of assertions in declarations or affidavits filed in court proceedings." (*Bach v. McNelis, supra*, 207 Cal.App.3d at pp. 864-865.) However, as the court in *Del E. Webb Corp.* recognized, a court "passing upon the question of the demurrer

may look to affidavits filed on behalf of plaintiff, and the plaintiff's answers to interrogatories [citation], as well as to the plaintiff's response to request for admissions," but "only where they contain statements of the plaintiff or his agent which are inconsistent with the allegations of the pleading before the court. The hearing may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of affidavits, declarations, depositions, and other such material which was filed on behalf of the adverse party and which purports to contradict the allegations and contentions of the plaintiff." (*Del E. Webb Corp. v. Structural Materials Co.*, *supra*, 123 Cal.App.3d at pp. 604-605.) Thus, "judicial notice of matters upon demurrer will be dispositive only in those instances where there is not or cannot be a factual dispute concerning that which is sought to be judicially noticed." (*Cruz v. County of Los Angeles* (1985) 173 Cal.App.3d 1131, 1134.)" (*Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 375.)

Cochran's deposition testimony and her response to form interrogatories, while constituting evidentiary admissions, are not properly subject to judicial notice, for they are subject to interpretation. For instance, Bennett's statement that Cochran is still an owner of the Property and that he would deed it back to her could mean either that he transferred title to a third party in alienation of Cochran's interests in the Property, or simply that he added his own name to the title, and would quitclaim the Property back to her. Similarly, Cochran's statement that her husband "caused me to lose my first home," while relevant evidence concerning the state of her knowledge, does not conclusively establish the fact which Starr seeks<sup>7</sup> to prove. Indeed, Cochran requested that this court take judicial notice of evidence to explain a contrary meaning of this statement. Because there is a factual dispute regarding the meaning of these statements, they are not subject to judicial notice.

Neither is Attachment 4 to the dissolution petition, which lists Cochran's separate property but does not include the Property, the proper subject of judicial notice. We note that Attachment 4 does not purport to be, nor was Cochran required to, submit a complete list of her separate property as part of the dissolution petition. The "fact" which Starr would have the court draw from the absence of the Property on the attachment to the petition is that Cochran did not believe that she owned the Property at the time the attachment was prepared. That is a reasonable inference to draw from the evidence, sufficient on a motion for summary judgment to shift to Cochran the burden of producing evidence to raise a triable issue on the question of whether she in fact knew that she no longer held title to the Property. It is not, however, a conclusive admission, for it does not contradict the allegations of the complaint.

In sum, there is a factual dispute concerning that which was sought to be judicially noticed, that is, when Cochran learned that Bennett had forged her signature on a fraudulent deed and terminated her rights in and to the Property. While Cochran's statements to the effect she had "lost" the Property on account of Bennett's actions, as well as her failure to list the Property as her separate property on Attachment 4 to the dissolution petition, constitute admissible evidence on the question, they do not conclusively establish what she knew concerning Bennett's defalcation at the time the statements were made. Consequently, the statements are not judicial admissions upon which judgment on the pleadings may be granted.

#### DISPOSITION

The judgment is reversed. Cochran is to recover her costs on appeal.

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ARMSTRONG, J.

I concur:

MOSK, J.

I respectfully dissent from the reversal of the judgment on the pleadings motions. I agree with defendant Kristin Starr Davila that the claims of plaintiff, Melody L. Cochran, are barred by the Code of Civil Procedure section 338 statute of limitations. My reasons were expressed in my dissenting opinion involving the codefendant, William Bennett, and I incorporate them here. (*Cochran v. Bennett* (Sept. 18, 2009, B210747) [nonpub. opn.].)

TURNER, P.J.